Lee Chin Cheng Dengkil Oil Palm v Kaplands Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-898 OF 2001

ABDUL HAMID MOHAMAD, RICHARD MALANJUM AND ARIFIN ZAKARIA JJCA

22 NOVEMBER 2002

Contract — *Construction of terms of contract — Intention of parties — Whether parties had agreed that private caveat on land should not be treated as an encumbrance for purposes of the sale and purchase agreement — Whether phrase in recital that land was to be sold 'in the present state and condition subject to all conditions of title' prevailed over terms in agreement that land shall be free 'from all encumbrances'*

Contract — *Sale and purchase of land — Variation — Whether parties had agreed to vary terms of agreement — Whether provision in agreement was still applicable in view of variation — Whether it was necessary for respondent to give notice of termination pursuant to terms of the agreement in view of the variation*

Land Law — *Restraint on dealings — Caveats — Private caveat — Whether private caveat was an encumbrance within the context of National Land Code 1965*

Words and Phrases — *Encumbrances — Meaning of*

The appellant was the registered owner of land known as Lot 6984, Mukim Dengkil, Daerah Sepang, Selangor ('the said land'). By a sale and purchase agreement ('the agreement') dated 2 July 1997, the respondent agreed to purchase the said land at the price of RM39,808,750. Upon execution of the agreement, the respondent paid the deposit amounting to 10% of the purchase price. Clause 2.1 of the agreement stipulated, inter alia, that the said land shall be free 'from all encumbrances and with vacant possession'. Clause 2.5 of the agreement provided that if at the time of presentation of the transfer in favor of the respondent, the title was not free from encumbrances other than caveats filed by the respondent and/or its financier, the respondent shall grant to the appellant a period of one month to remove the encumbrances failing which the respondent shall have the option to abort the purchase and the deposit shall then be refunded to the respondent. Clause 10.2 of the agreement provided that if the appellant should fail to complete the sale of the said property or default in any other obligations on the part of the appellant to be performed, the respondent shall be entitled to either claim for specific performance of the agreement or terminate the agreement by notice to the appellant, whereupon the appellant shall refund to the respondent the deposit. The respondent was concerned over a certain private caveat ('the MPI caveat') that had been entered against the said land and this had prompted the respondent to write to the appellant on 21 November 1997 and propose that the appellant be given a period of three months to clear the title from all encumbrances, other than

the caveats filed by the respondent and/or its financier. It was further proposed that if at the end of the three month period, the encumbrances were still not removed, the respondent would have the option to abort the purchase or to grant a further extension of time thereon. The appellant replied to the respondent on 24 November 1997 stating its agreement to the respondent's proposal. Accordingly, the balance sum had to be paid by 19 February 1998 ('the completion date'). The respondent refused to pay the balance sum on the completion date due to the existence of the MPI caveat on the said land and aborted the agreement. The respondent claimed for the refund of the 10% deposit paid to the appellant but the appellant maintained that the respondent had wrongfully terminated the agreement and the appellant was entitled to forfeit the 10% deposit. The learned trial judge agreed with the respondent and entered judgment in favor of the respondent. This is the appellant's appeal against the decision of the learned judge.

Held, dismissing the appeal:

(1) The word 'encumbrances' read within the context of the National Land Code 1965 included a private caveat. Therefore, the word 'encumbrances' as used in the agreement included the MPI caveat (see p 185C–D); *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 MLJ 456 followed.

(2) If the parties had indeed agreed that the MPI caveat should not be treated as an encumbrance for the purpose of the agreement (as alleged by the appellant), then the parties could have expressly said so in the agreement itself. Further, even if there was an agreement between the parties to vary the terms of the agreement so as to disregard the private caveat for the purpose of the agreement, such variation would have to be evidenced in writing, as required by cl 21.3 of the agreement, which provided that no amendment of the provisions of the agreement shall be binding or effective unless it was in writing and signed by all the parties (see p 186C–F).

(3) The phrase '... in the present state and condition subject to all conditions of title ...' as found in recital (B) of the agreement could not override cll 2.1 and 11.1 of the agreement that the said land shall be free 'from all encumbrances and with vacant possession'. Therefore, in accordance with the terms of the agreement, the appellant was under an obligation to ensure that the said land was free from all encumbrances and with vacant possession on the completion date (see p 187A–B).

(4) From the appellant's letter dated 24 November 1997, it was clear that the parties had agreed to vary the terms of the agreement to the extent stated in the said letter. Therefore, by necessary implication, cl 2.5 of the agreement was no longer

applicable in view of the variation, otherwise, the variation would be devoid of any effect whatsoever. The parties had, under the new terms, agreed to give the appellant a specific time frame to clear the title of the said land of all the encumbrances, other than those expressly excepted, failing which the respondent was given the option to abort the purchase. This was clearly intended to override the provisions of cl 2.5 of the agreement (see p 190C, H–I).

(5) By virtue of the variation to the terms of the agreement as embodied in the appellant's letter of 24 November 1997, it was no longer necessary for the respondent to give a notice under cl 10.2 of the agreement because under the varied terms, what the respondent was required to do at the end of the three month period was to see whether the title was free from all encumbrances other than the existing charge and the caveats filed by the respondent and/or its financier. If it was not, then the respondent had the option, without more, to abort the purchase or to grant a further extension of time to the appellant. If the respondent was not desirous of granting a further time then what the respondent needed to do was to give a notice, as had been done by the respondent in the instant case, to the appellant that it had chosen to abort the purchase and with such notice the respondent was immediately entitled to the refund of the deposit. No further notice under cl 10.2 of the agreement was required. Accordingly, the respondent's letter of 20 February 1998 purporting to terminate the agreement was legally valid and effective (see p 191C–F).

[Bahasa Malaysia summary

Perayu adalah pemilik berdaftar sekeping tanah yang dikenali sebagai Lot 6984, Mukim Dengkil, Daerah Sepang, Selangor ('tanah tersebut'). Melalui satu perjanjian jual beli ('perjanjian tersebut') bertarikh 2 Julai 1997, responden telah bersetuju membeli tanah tersebut pada harga RM39,808,750. Setelah penyempurnaan perjanjian tersebut, responden telah membayar deposit berjumlah 10% daripada harga belian. Klausa 2.1 perjanjian menyatakan, antara lain, bahawa tanah tersebut perlu bebas 'from all encumbrances and with vacant possession'. Klausa 2.5 perjanjian memperuntukkan bahawa jika pada masa penyampaian pemindahan tersebut yang berpihak kepada responden, hakmilik tersebut tidak bebas daripada sekatan selain daripada kaveat-kaveat yang difailkan oleh responden dan/atau pembiayanya, responden hendaklah memberikan perayu satu tempoh selama sebulan untuk membatalkan sekatan-sekatan tersebut yang mana jika perayu gagal berbuat demikian, responden mempunyai pilihan untuk membatalkan belian tersebut dan deposit tersebut hendaklah dikembalikan kepada responden. Klausa 10.2 kepada perjanjian tersebut memperuntukkan bahawa jika perayu

gagal menyempurnakan jualan tanah tersebut atau gagal dalam apa-apa tanggungjawab di pihak perayu untuk dilaksanakan, responden berhak untuk sama ada menuntut pelaksanaan spesifik perjanjian tersebut atau menamatkan perjanjian tersebut melalui notis kepada perayu, di mana perayu hendaklah mengembalikan deposit kepada respondent. Responden bimbang tentang satu kaveat persendirian ('kaveat MPI') yang telah dimasukkan ke atas tanah tersebut dan ini telah menyebabkan responden menulis kepada perayu pada 21 November 1997 dan mencadangkan agar perayu diberikan satu tempoh selama tiga bulan untuk membebaskan hakmilik tersebut daripada semua sekatan, selain daripada kaveat-kaveat yang telah difailkan oleh responden dan/atau pembiayanya. Seterusnya telah dicadangkan jika di akhir tempoh tiga bulan tersebut, sekatan-sekatan tersebut masih tidak dibatalkan, responden akan mempunyai pilihan untuk membatalkan belian atau memberikan satu lanjutan masa yang lain. Perayu telah membalas kepada responden pada 24 November 1997 dengan menyatakan persetujuannya kepada cadangan responden. Sewajarnya, baki jumlah tersebut perlu dibayar pada 19 Februari 1998 ('tarikh penyelesaian'). Responden enggan membayar baki jumlah tersebut pada tarikh penyelesaian oleh sebab kewujudan kaveat MPI atas tanah tersebut dan membatalkan perjanjian tersebut. Responden menuntut bayaran balik deposit sebanyak 10% yang telah dibayar kepada perayu tetapi perayu menegaskan bahawa responden telah membatalkan perjanjian tersebut dengan salah dan perayu berhak mengambil deposit 10% tersebut. Hakim perbicaraan yang arif bersetuju dengan responden dan memasuki penghakiman bagi pihak responden. Ini adalah rayuan perayu terhadap keputusan hakim yang arif.

Diputuskan, menolak rayuan tersebut:

(1) Perkataan 'encumbrances' dibaca dalam konteks Kanun Tanah Negara 1965 termasuk kaveat persendirian. Oleh itu, perkataan 'encumbrances' sebagaimana yang digunakan dalam perjanjian adalah termasuk kaveat MPI tersebut (lihat ms 185C–D); *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 MLJ 456 diikut.

(2) Sekiranya pihak-pihak sememangnya bersetuju bahawa kaveat MPI tidak patut dianggap sebagai satu sekatan bagi tujuan perjanjian (sebagaimana yang dikatakan oleh perayu), oleh itu pihak-pihak sepatutnya menyatakan sedemikian dalam perjanjian tersebut. Tambahan pula, jikapun terdapat satu perjanjian antara pihak-pihak untuk mengubah terma-terma perjanjian agar kaveat persendirian tidak dihiraukan bagi tujuan perjanjian tersebut, perubahan tersebut sepatutnya diberi keterangan secara bertulis, sebagaimana yang dikehendaki dalam kl 21.3 perjanjian tersebut, yang memperuntukkan bahawa tiada pindaan kepada peruntukan-peruntukan perjanjian tersebut akan mengikat atau

berkuat kuasa kecuali ia secara bertulis dan ditandatangani oleh semua pihak (lihat ms 186C–F).

(3) Ungkapan '... in the present state and condition subject to all conditions of title ...' sebagaimana didapati dalam resital (B) perjanjian tidak boleh mengatasi kl 2.1 dan 11.1 perjanjian bahawa tanah tersebut adalah bebas 'from all encumbrances and with vacant possession'. Oleh itu, menurut terma-terma perjanjian, perayu adalah bertanggungjawab untuk memastikan bahawa tanah tersebut adalah bebas daripada semua sekatan dan dengan milikan kosong pada tarikh penyelesaian tersebut (lihat ms 187A–B).

(4) Daripada surat perayu bertarikh 24 November 1997, adalah jelas bahawa pihak-pihak telah bersetuju untuk mengubah terma-terma perjanjian sebagaimana yang dinyatakan dalam surat tersebut. Oleh itu, melalui implikasi yang sewajarnya, kl 2.5 perjanjian tersebut tidak lagi terpakai memandangkan terdapatnya perubahan tersebut, jika tidak, perubahan tersebut tidak mempunyai apa-apa kesan langsung. Pihak-pihak telah, di bawah terma-terma baru, bersetuju untuk memberikan perayu satu tempoh masa yang spesifik untuk membebaskan hakmilik tanah tersebut daripada semua sekatan, selain daripada yang telah dinyatakan untuk dikecualikan, di mana jika gagal, responden akan diberikan pilihan untuk membatalkan belian tersebut. Adalah jelas terdapat niat untuk menolak peruntukan kl 2.5 perjanjian tersebut (lihat ms 190C, H–I).

(5) Menurut perubahan terma-terma perjanjian sebagaimana yang terkandung dalam surat perayu bertarikh 24 November 1997, adalah tidak perlu untuk responden memberikan notis di bawah kl 10.2 perjanjian kerana di bawah terma-terma yang diubah tersebut, apa yang responden perlu buat di akhir tempoh tiga bulan tersebut adalah untuk melihat sama ada hakmilik tersebut bebas daripada semua sekatan selain daripada gadaian yang wujud dan kaveat-kaveat yang difailkan oleh respondent dan/atau pembiayanya. Jika tidak, maka responden mempunyai pilihan, tidak lebih daripada itu, untuk membatalkan belian tersebut atau memberikan lanjutan masa lagi kepada perayu. Jika responden tidak berhasrat untuk memberikan lanjutan masa, maka apa yang responden perlu buat adalah untuk memberikan satu notis, sebagaimana yang telah dilakukan oleh responden dalam kes semasa, kepada perayu bahawa ia telah memilih untuk membatalkan belian tersebut dan dengan notis sedemikian responden dengan serta-merta berhak untuk mendapat balik deposit tersebut. Tiada notis lanjutan di bawah kl 10.2 perjanjian yang diperlukan. Sewajarnya, surat responden bertarikh 20 Februari 1998 yang bertujuan untuk menamatkan perjanjian tersebut adalah sah di sisi undang-undang dan berkuatkuasa (lihat ms 191C–F).]

Notes

For cases on intention of parties under construction of terms of contract, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 2381–2386.

For cases on variation under sale and purchase of land, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 3716–3717.

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3015–3312.

Cases referred to

Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513 (refd)

Karuppannan v Balakrishnen (Chong Lee Chin & Ors, third parties) [1994] 3 MLJ 584 (refd)

Leggot v Barnett (1880) 15 Ch D 306 (refd)

Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd [2000] 2 MLJ 456 (folld)

Railway Assets Corp v Elmspark Holding [1997] 3 MLJ 224 (refd)

Woon Kim Poh v Sa'amah bt Hj Kasim [1987] 1 MLJ 400 (refd)

Legislation referred to

National Land Code s 322(2)

Appeal from: Civil Suit No S7–(4)–22–321 of 1998 (High Court, Kuala Lumpur)

DP Naban (*Ben CC Chan* and *Andrew Chiew Ean Vooi* with him) (*Lee Hishammuddin)* for the appellant.

Dato' Mahinder Singh Dulku (*Shahidah bte Aris* with him) (*Mahinder Singh Dulku & Co*) for the respondent.

Arifin Zakaria JCA: The appellant (the defendant in the court below) is the registered owner of land known as Lot 6984, Mukim Dengkil, Daerah Sepang, Selangor ('the said land'). By a sale and purchase agreement ('the agreement') dated 2 July 1997, the respondent (the plaintiff in the court below) agreed to purchase the said land at the price of RM39,808,750. Upon execution of the agreement, the respondent paid the sum of RM3,980,875 being the 10% deposit pursuant to cl 2.1 of the agreement. According to cl 2.2, the balance of the purchase price ('the balance sum') is to be paid on or before the expiry of 90 days from the application date or within seven days from the receipt of approval from the FIC, whichever shall be the later. Through exchange of letters it was agreed between the parties that the date of payment of the balance sum shall be 19 February 1998 ('the completion date').

At the material time, three private caveats were lodged against the said land by:

A (i) MPI Paper Mill Sdn Bhd dated 9 January 1995 ('the MPI caveat');

(ii) Straw Paperboard Industries dated 24 October 1997; and

(iii) Golden Skyline Sdn Bhd dated 18 October 1998.

However, both before this court and the court below, the respondent only relied on the MPI caveat as a ground in support of its contention that the B title of the said land was not free from encumbrances on the completion date. For that reason, the respondent refused to pay the balance sum on the completion date, and pursuant to cl 10.2 of the agreement, the respondent aborted the agreement and claimed for the refund of the 10% deposit paid to the appellant.

C The appellant, however, maintains that the respondent had wrongfully terminated the agreement and in the circumstances, the appellant was entitled to forfeit the 10% deposit. The learned trial judge agreed with the respondent and entered judgment in favor of the respondent. The appellant now appeals to this court against the decision of the learned judge.

D The premise upon which the respondent sought to terminate the agreement is borne out in the respondent's letter of 20 February 1998, the material part of which reads:

> Your clients had previously agreed vide your letter of 24 November 1998 that at the end of the three months' period which was determined to be 19 February 1998, the title is to be free from encumbrances, other than the E BOC charge and the caveats filed by our client and/or its financier. The caveat filed by MPI Paper Mills Sdn Bhd was never agreed to be an exception to the abovementioned term. Further it was never agreed that our client is to present for registration the withdrawal of any caveat on behalf of your client.
>
> We have made a further search at the Land Office Shah Alam today and we note that the caveat filed by Straw Paperboard Sdn Bhd is still not lifted.
>
> F As the title is still encumbered, our client now exercises the option to abort the purchase of the subject land and accordingly requests the immediate refund of the moneys due to them.

The respondent in the main relies on cl 2.1 of the agreement which stipulates, inter alia, that the said land shall be free 'from all encumbrances G and with vacant possession'. It is common ground that on 20 February 1998, the MPI caveat was still in force against the said land.

The first issue raised in this appeal is whether the MPI caveat is an 'encumbrance' for the purpose of the agreement. The learned counsel for the appellant contended that the word 'encumbrances' as found in the agreement does not include private caveats. The agreement does not define H the word 'encumbrances'. The learned trial judge relying on the case of *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 MLJ 456 and the case of *Karuppannan v Balakrishnen (Chong Lee Chin & Ors, third parties)* [1994] 3 MLJ 584 held that the MPI caveat, which is a private caveat, is an I encumbrance within the context of the National Land Code ('the NLC').

The nature and effect of a private caveat is governed by s 322(2) of the NLC which provides that:

The effect of any private caveat expressed to bind the land itself [or an undivided share in the land] shall, subject to sub-sections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of – A

(a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;

(b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and B

(c) any lien-holder's caveat in respect thereof [:]

[Provided that where the claim is in respect of a part of the land, the caveat binds the whole land and where the claim is in respect of an undivided share in the land, the caveat binds the whole of the undivided share in the land.] C

The Supreme Court in *Woon Kim Poh v Sa'amah bt Hj Kasim* [1987] 1 MLJ 400 explained the effect of a private caveat. At p 402 it said:

The effect of a private caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. See also *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212. A caveat freezes the register at least until the caveator has taken court action to determine his claim — Judith Sihombing, p 588. In the Torrens system where registration is the very basis of the system the prohibition in s 322(2) must be strictly complied with. In other words the Registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code. D E

In short, the effect of private caveat is to freeze the register at least until the caveat is removed. In similar vein, Gopal Sri Ram JCA in *Mewah Plus Property Sdn Bhd* at pp 459–460 said:

With due respect to counsel for the appellant, we are unable to agree with his argument. In our judgment, the word 'encumbrances' in the two clauses already quoted refers to some impediment in the registered title to the said property which prevents the registration of title from the respondent to the appellant. As was pointed out to counsel during argument, 'encumbrances' in the context of the agreement in question means an encumbrance in the National Land Code sense. As to what amounts to an encumbrance in the context of the National Land Code, reference may be usefully made to two decisions of the Privy Council on the point. F G

The first is *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267, where Lord Diplock when delivering the advice of the Board said (at p 269):

'In the National Land Code it is s 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an ultra vires acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. If registered they would amount to encumbrances within the meaning of a covenant against encumbrances; but unless registered they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be entitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as H I

> encumbrances on a registered title. Instead they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered proprietor so long as the caveat remains in force; that is, until it is removed from the register. The way in which this system of protection operates was dealt with by their Lordships in the recent case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, to which reference may conveniently be made.'
>
> The second is *Letchumanan Chettiar v Palaniappa Chettier* [1983] 1 MLJ 6, where (at p 9) Lord Templeman referred to a caveat upon the register as 'the only relevant encumbrance', thereby rendering a wider meaning to that expression than that given it by Lord Diplock in *T Damodaran v Choe Kuan Him*.

(See further the case of *Karuppanan v Balakrishnen* cited by the learned judge.)

Based on the above authorities, we agree with the learned judge that the word 'encumbrances' read within the context of the NLC would include a private caveat. Therefore, the word 'encumbrances' as used in the agreement would certainly include the MPI caveat.

The further contention by learned counsel for the appellant is that in construing the word 'encumbrances' the court is entitled to look at the circumstances leading to the agreement. In support, he cited the case of *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 MLJ 513. In that case, Chong Siew Fai FCJ (as he then was) at p 522 said:

> Regard must also be had to any surrounding circumstances, if any, which might legitimately be taken into consideration. In *Chamber Colliery Co Ltd v Twyerould* [1915] 1 Ch 268n at p 272, Lord Watson said:
>
> 'I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses, and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.'
>
> And, in *Barton v Fitzgerald* (1812) 15 East 530 at p 541, Lord Ellenborough CJ said:
>
> 'It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.'

(See also *Railway Assets Corp v Elmspark Holding* [1997] 3 MLJ 224.)

In the present case, it is not disputed that in the course of the negotiations, the respondent was informed of the MPI caveat. This is evident from the exchange of letters between solicitors for the parties (see pp 476–492 of the appeal record.) This is supported by the witness statement of Dato' Iqbal bin Kuppa Pitchai Rawther (PW1) (see Q & A 24 at p 648 of appeal record). DW2 (Mr Lee Boon Joo) in his witness statement at pp 659–660 of the appeal record went even further to say that

Mr Chan Kai Kum, who was the director of the plaintiff, and En Shahrom, the respondent's solicitor, in the course of the negotiations were specifically informed of MPI's interest in the said land and that the respondent should not regard the MPI caveat as an encumbrance for the purpose of the agreement. He informed the court that both Mr Chew Kai Kum and En Shahrom agreed to this proposal. In his answer to question no 30, he said:

> It was agreed by Mr Chew Kai Kum and En Shahrom that the MPIPM's private caveat should not be regarded as an encumbrance to the land. The defendant accepted that as well. The defendant had acted on that plaintiff's agreement because the whole agreement would not go through otherwise.

Having considered the appellant's submission on this issue, we find that it is devoid of any merit. Our reason for saying so is that if the defendant's allegation that the parties were in agreement that the MPI caveat should not be treated as an encumbrance for the purpose of the agreement, then the parties could have expressly said so in the agreement itself. The evidence of DW2 merely shows that the respondent was informed of the MPI caveat prior to the execution of the agreement; and nothing more. That being the case, we find it hard to accept the appellant's contention that the parties have agreed that the MPI caveat was not to be regarded as an encumbrance for the purpose of the agreement.

Further, we agree with the learned judge that if there is any agreement between the parties to vary or amend any terms of the agreement so as to disregard the MPI caveat for the purpose of the agreement, such variation or amendment will have to be evident in writing, as required by cl 21.3. The said clause clearly stipulates that no amendement of, or addition to, the provisions of the agreement shall be binding or effective unless it is in writing signed by all the parties. We find there is no such agreement between the parties.

The appellant further contended that since the MPI caveat was in existence prior to the signing of the agreement, the respondent is, therefore, deemed to have accepted it as the parties have agreed to accept the said land '... in its present state and condition subject to all conditions of title ...' as per recital (B) of the agreement. The learned judge rejected this argument. In his judgment he said:

> In my view, the phrase 'in its present state and condition' does not replace the term 'free from all encumbrances and with vacant possession'. Moreover, this phrase appears in the recital, it cannot override cll 2.1 and 11.1 as contained in the S & P Agreement. Thus, 'free from all encumbrances and with vacant possession' remains a fundamental term of the S & P Agreement and at the completion date, the said land was not 'free from all encumbrances and with vacant possession'. It is clear that cll 2.1 and 11.1 have been breached.

We entirely agree with the learned judge. As observed by Brett LJ in *Leggot v Barnett* (1880) 15 Ch D 306 at p 311:

> If there is any doubt about the construction of the governing words of that document, the recital may be looked at in order to determine what is the true

A construction; but if there is no doubt about the construction, the right of the parties are governed entirely by the operative part of the writing or the deed.

Similarly in the present case, we are of the view that the phrase '... in the present state and condition subject to all conditions of title ...' as found in recital (B) could not override cll 2.1 and 11.1 of the agreement. In short, in B accordance with the terms of the agreement, the appellant is under the obligation to ensure that the said land is free from all encumbrances and with vacant possession on the completion date.

Reverting to the facts in the present case, it is common ground that on 19 February 1998, ie the new completion date, the MPI caveat was still in force against the said land, and that had prompted the plaintiff through its C solicitors to write to the defendant's solicitors purporting to abort the agreement pursuant to cl 2.5 of the agreement. The next issue is whether, the respondent had complied with the terms of the agreement in bringing the agreement to an end. This calls for our consideration cll 2.5 and 10 of the agreement. Clause 2.5 provides as follows:

D 2.5 If at the time of presentation of the transfer in favor of the purchaser the title is not free from encumbrances other than caveats filed by the purchaser and/or its financier the purchaser shall grant to the vendor a period of one (1) month to clear the title to enable presentation of the transfer failing which the purchaser shall have the option to abort the purchase and upon exercise of such option by the purchaser the vendor E shall refund to the purchaser the deposit and all other moneys paid by the purchaser to the vendor or to the vendor's solicitors pursuant to the provisions of this agreement including interest (if any) in exchange for re-delivery of vacant possession of the said property and all documents delivered to the purchaser's solicitors and/or the financier's solicitors pursuant to the provisions of this agreement except for the said transfer F which the purchaser's solicitors are authorized to make an application to the collector of stamp duty for cancellation and refund of the stamp duty paid thereon.

Therefore, according to this clause, the appellant is given a month's grace to clear the title of any encumbrance other than the caveats filed by the respondent and/or its financier. If the appellant fails to clear the title of such G encumbrances after the expiration of the said period then and only then would the respondent be entitled to abort the purchase.

The other clause which governs default by parties is cl 10 of the agreement which reads as follows:

H 10 DEFAULT BY THE PARTIES.

10.1 If the purchaser shall default in payment of the balance of purchase price or otherwise in discharging the obligations of the purchaser in connection with payment or satisfaction of the balance of purchase price in accordance with the terms and conditions set out herein, or if the purchaser shall default in any other obligations on the part of the I purchaser to be performed and observed in this agreement, the vendor shall be entitled to terminate this agreement forthwith by notice in writing to the purchaser and thereafter the deposit shall be absolutely forfeited to the vendor as agreed liquidated damages but all other payments by the

purchaser towards the purchase price (if any) shall be refunded to the purchaser free of interest in exchange whereof the purchaser shall return or cause to be returned to the vendor all documents delivered to the purchaser's solicitors and/or the purchaser's financiers or its solicitors pursuant to the provisions of this agreement together with valid and registrable withdrawal of caveat lodged by the purchaser and/or the purchaser's financiers accompanied by the necessary registration fees. The purchaser shall also re-deliver vacant possession of the said property if vacant possession has already been delivered to the purchaser. Thereafter this agreement shall be null and void and of no further force or effect and neither party shall have any claim whatsoever against the other and the vendor shall be entitled, at its absolute discretion to sell or otherwise deal with the said property in such manner as the vendor shall deem fit and keep any profit made on any such re-sale or dealing.

10.2 If the vendor fails to complete the sale of the said property to the purchaser in accordance with the terms and conditions set out herein or if the vendor shall default in any other obligation on the part of the vendor to be performed and observed in this agreement and such default is not rectified by the vendor within seven (7) days of notice of such default given by the purchaser, the purchaser shall be entitled to at its option to either:

(a) take such action as may be available to the purchaser at law to claim for specific performance of this agreement together with all relief flowing therefrom; OR

(b) terminate this agreement by notice to the vendor whereupon the vendor shall refund to the purchaser the deposit together with any sum in excess thereof paid by the purchaser towards the purchase price free of interest in exchange wherefore the purchaser shall return or cause to be returned to the vendor all documents delivered by the vendor or the vendor's solicitors to the purchaser's solicitors and/or the purchaser's financiers or its solicitors together with valid and registrable withdrawal of caveats lodged by the purchaser and/or purchaser's financiers accompanied by the necessary registration fees.

Thereafter this agreement shall be null and void and of no further force or effect and neither party shall have any claim whatsoever against the other and the vendor shall be entitled at its absolute discretion to sell or otherwise deal with the said property in such manner as the vendor shall deem fit.

On the facts in the present case, the learned judge took the view that cl 10.2 of the agreement is the governing clause as regards the procedure to be followed by the respondent in order to abort the purchase of the said land. However, the learned judge made no reference whatsoever to cl 2.5 above. We reserve our comment on this to the later part of our judgment. In his judgment, the learned judge considered the circumstances leading to, and culminating in the termination of the agreement by the respondent; and he said:

It is noted that what the plaintiff needs to do when a breach of the S & P Agreement occurs, is that he must serve on the defendant a seven (7) day notice of such default, and thereafter he is entitled to (a) specific performance or (b) terminate the S & P Agreement.

From the facts of the case, the completion date was 19 February 1998 and the plaintiff rescinded the S & P Agreement on the following day, ie 20 February 1998. It seems that in its anxiety to rescind the S & P Agreement, it failed to observe cl 10.2. The plaintiff submitted that there is no requirement of a seven day notice in view of the exchange of letters between the plaintiff and the defendant's letters, as shown below.

In the plaintiff's letter dated 21 November 1977 (pp 37–38 of Bundle B), para (d) states:

> '(d) that at the end of the three month period as stipulated in (a) above the vendor fails to clear the title from encumbrances, Kaplands shall have the option to abort the purchase and upon exercise of such option by Kaplands, the vendor shall refund to Kaplands the deposit already paid including interest or to grant a further extension of time thereon.'

In reply, the defendant's solicitor in its letter dated 24 November 1997 stated that 'we confirm that our clients have agreed to the following pursuant to your letter to us dated 21 November 1997' and repeated para (d) (p 42 of Bundle B). In his testimony (at p 20 of Notes) DW2 (a director of the defendant) rationalized that:

> '10.2 notice was not given because of para (d) of the solicitor's letter.'

The learned counsel for the appellant contended that the learned judge's finding is not supported by the evidence before the court. He contended that para (d) of the respondent's letter dated 21 November 1997 does not have the effect of varying cll 2.5 and 10.2 of the agreement.

Looking at the respondent's letter of 21 November 1997, it appears that the respondent was concerned over certain private caveats that had been entered against the said land and this had prompted the respondent to propose that the appellant be given a period of three months to clear the title from all encumbrances, other than the caveats filed by the respondent and/or its financier. It is further proposed in sub-para (d) of the letter that if at the end of the three month period the appellant still fails to clear the title from those encumbrances, the respondent shall have the option to abort the purchase and upon exercise of such option by the respondent, the appallent shall refund to the respondent the deposit already paid including interest or to grant a further extension of time thereon. The appellant's reply to the respondent's letter of 21 November 1997 is contained in its letter of 24 November 1997. The material part of the letter reads as follows:

> We refer to our letter of even date and confirm that our clients have agreed to the following pursuant to your clients' letter to us dated 21 November 1997:
>
> (a) That our clients be given a period of three (3) months to clear the title from encumbrances other than the caveats filed by Kaplands Sdn Bhd and/or its financier ('purchaser's caveats') and the charge in favor of Bank of Commerce (M) Bhd ('BOC Charge') in respect of which we have already obtained a Discharge of Charge.
>
> (b) That payment of the balance purchase price be made within seven (7) days of notification to you or your clients that the title is free from encumbrances other than the purchaser's caveat and the BOC Charge.
>
> (c) ...

(d) If at the end of the three (3) month period stipulated in (a) above, our clients fail to clear the title from encumbrances other than the BOC Charge and the caveats filed by your clients and/or its financier, your clients will have the option to abort the purchase and upon exercise of such option our clients will refund to your clients the deposit paid including interest unless a further extension is agreed upon. A

(e) In the event your clients fail to pay the balance purchase price together with interest within seven (7) days of removal of the encumbrances other than the purchaser's caveats and the BOC Charge then such default will amount to a default under cl 10.1 of the Sale and Purchase Agreement dated 2 July 1997 and the provisions of cl 10.1 shall apply. B

Apart from the above variations all other terms and conditions of the Sale and Purchase Agreement dated 2 July 1997 shall prevail. C

Thus, from the appellant's own letter cited above, it is patently clear that the parties have agreed to vary or amend particular terms of the agreement to the extent stated in the said letter. This brings us to the main issue in contention: what is the effect of the variation or amendment, as agreed between the parties, on cll 2.5 and 10.2 of the agreement? D

The respondent contended, by virtue of the said variation, cll 2.5 and 10.2 of the agreement are no longer applicable and of no further effect. To put it simply, the respondent's case is that by reason of the said variation the parties have agreed to a definite time frame for the appellant to clear the title of certain encumbrances failing which the respondent is given the option to abort the purchase. The respondent contended this is clearly intended to override cll 2.5 and 10.2 of the agreement otherwise the variation would be devoid of any meaning whatsoever. Reading the judgment of the learned trial judge, we think it is implicit in his judgment that he agreed with the respondent's contention that cl 2.5 of the agreement is no longer of any effect in view of the agreed variation. And as regard cl 10.2, he said: E F

> The defendant seemed not to be serious about this cl 10.2 because upon the receipt of the termination letter, the defendant served upon the plaintiff a letter claiming for the forfeiture of the deposit. By the same token analogous to cl 10.2, the defendant had not served a seven day notice to the plaintiff, as cl 10.2 has imposed a duty to serve notice on one party, it is equally applicable to the other party, otherwise it offends the notion of justice. G
>
> It is clear that in view of this evidence, a breach of cl 10.2 is not fatal. By the acts of the parties, they are no longer bound strictly by cl 10.2.

We agree with the learned judge that by necessary implication, cl 2.5 is no longer applicable in view of the variation, otherwise as rightly contended by the respondent, the variation would be devoid of any effect whatsoever. We arrived at this conclusion on the premise that the parties had, under the new terms, agreed to give the appellant a specific time frame to clear the title of the said land of all the encumbrances, other than those expressly excepted, failing which the respondent is given the option to abort the purchase. This in our view is clearly intended to override the provisions of cl 2.5 of the agreement. H I

A The only remaining issue is whether the respondent is still required to give the requisite notice as stipulated in cl 10.2 of the agreement when it decides to abort the purchase. Needless to say that no such notice was given to the appellant by the respondent. The learned judge held that the fact that the respondent failed to give such notice is not fatal to respondent's case on the ground that the appellant likewise failed to give such a notice to the B respondent in purporting to forfeit the deposit. He concluded by saying that by their acts the parties are no longer bound strictly by cl 10.2. We agree with the learned judge that, in the circumstances, the appellant is no longer required to give the notice as stipulated in cl 10.2, but for different reasons. Firstly, we are of the view that from the plain reading of cl 10.2 it is clear C that it applies only to the respondent as the purchaser and not the appellant who is the vendor. For that reason we are of the view, contrary to what was held by the learned judge, that there is no obligation on the part of the appellant to give the respondent a notice under cl 10.2. In other words cl 10.2 only applies to the respondent. However, by virtue of the variation to the terms of the agreement as embodied in sub-para (d) of the appellant's D own letter of 24 November 1997, we are of the view that it is no longer necessary for the respondent to give a notice under cl 10.2 of the agreement.

Under the new terms, as agreed between the parties, what the respondent (purchaser) needs to do at the end of the three month period is to see whether the title is free from all encumbrances other than the BOC charge and the caveats filed by the respondent or its financier. If the answer E is in the negative, then the respondent has the option, without more, to abort the purchase or to grant a further extension of time to the appellant. If the respondent is not desirous of granting a further time, then what the respondent needs to do is to give a notice, as was done by the respondent, to the appellant that it had chosen to abort the purchase and with such F notice, the respondent is immediately entitled to the refund of the deposit. No further notice under cl 10.2 is required. For these reasons, we are of the view that the respondent's letter of 20 February 1998 purporting to terminate the agreement is legally valid and effective.

For the above reasons we find no merit in this appeal and we dismissed the same with costs. We ordered that the deposit be paid to the respondent G towards account of taxed costs.

Appeal dismissed.

Reported by Lim Lee Na

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